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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1290

ANTHONY S. CAROLLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner, Anthony S. Carollo, prays that a writ of certiorari be issued to review the judgment

of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of the United States District Court for the Eastern District of Louisiana which in turn affirmed petitioner's conviction, after trial before a United States Magistrate, of a violation of 26 USC 5117(a).

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit was rendered on January 23, 1975, and is not yet reported. It is appended hereto as Appendix "A". A petition for rehearing was denied without opinion by the Court of Appeals on March 13, 1975, and notice of this denial is appended hereto as Appendix "B". The decision of the District Court was rendered on February 6, 1974, and is not reported. The

judgment of conviction was rendered by U. S. Magistrate Ingard O. Johannesen on January 9, 1974, (R.42) and is not reported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 USC 1254, to review by writ of certiorari the judgment rendered in the Court of Appeals for the Fifth Circuit on January 23, 1974, and entered that same date, and as to which judgment petitioner herein filed a petition for rehearing and for rehearing en banc on February 2, 1975, which petition was denied on March 13, 1975.

The jurisdiction of the United States of Appeals for the Fifth Circuit was invoked under 28 USC 1291, to review by appeal the final decision of the Hon.

Lansing Mitchell, Judge, Section "F" of the U. S. District Court for the Eastern District of Louisiana, rendered on February 6, 1974.

The jurisdiction of the district judge in the Eastern District of Louisiana was invoked under 18 USC 3402 and Rule 8 of the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, to review the judgment of conviction rendered by the U. S. Magistrate on January 9, 1974.

The jurisdiction of the U. S. Magistrate was invoked by the United States of America pursuant to 26 USC 5117 by filing an Information accusing petitioner herein of a violation of said statute.

QUESTIONS PRESENTED

At the trial on the merits before

the U. S. Magistrate, the Government sought to introduce in evidence an oral inculpatory statement which Special Agent Klotz of the U. S. Treasury's Alcohol, Tobacco and Firearms Bureau, commanding an administrative inspection team, elicited from petitioner by interrogating him as to the source of his liquor stock, particularly that of several bottles which Klotz had already observed to bear retail-type price marks. Petitioner objected to the introduction in evidence of such statement, on the grounds that petitioner had not been advised of his "Miranda rights" prior to commencement of this interrogation. The Magistrate, after hearing testimony on the admissibility predicate, held that Miranda v. Arizona (1966) 384 US 436 did not control the

instant situation, and that the statements were admissible in evidence against petitioner, notwithstanding SA Klotz' testimony that he had not advised petitioner that he was suspected at that point of a criminal violation, nor that he was entitled to remain silent, to obtain assistance of counsel, etc., and that anything he might say would be used in evidence against him. The petitioner, upon being convicted, appealed, first to the judge of the District Court, and then to the Court of Appeals, both of which Courts affirmed the decision of the Magistrate. The questions presented to this Court are:

I. SHOULD ONE CONFRONTED WITH GOVERNMENTAL AUTHORITY IN AN ADVERSARY SITUATION BE ACCORDED THE OPPORTUNITY TO MAKE AN INTELLIGENT DECISION AS TO THE ASSERTION OR RELINQUISHMENT OF THOSE CONSTITUTIONAL RIGHTS---i.e., FIFTH AMENDMENT

FREEDOM FROM INVOLUNTARY SELF-INCRIMINATION AND SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL--DESIGNED TO PROTECT HIM UNDER PRECISELY SUCH CIRCUMSTANCES?

and, specifically:

II. IS AN INDIVIDUAL RESTAURANT OPERATOR, IN WHOSE RESTAURANT AN ADMINISTRATIVE A.T.F. INSPECTION IS BEING CONDUCTED---IN THE COURSE OF WHICH INSPECTION THE A.T.F. AGENTS DISCOVER LIQUOR BOTTLES BEARING RETAIL-TYPE PRICE-STAMP MARKINGS (INDICATING THAT THEY MAY HAVE BEEN ACQUIRED FROM A RETAILER SUCH AS A SUPERMARKET OR PACKAGE LIQUOR STORE AND NOT FROM A WHOLESALER, IN VIOLATION OF 26 USC 5117)---ENTITLED TO BE INFORMED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS VIA A MIRANDA-TYPE WARNING PRIOR TO BEING QUESTIONED BY SAID AGENTS CONCERNING THE SOURCE OF HIS LIQUOR STOCK IN GENERAL AND OF THE PRICE-MARKED BOTTLES IN PARTICULAR?

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

The pertinent provisions of the Fifth and Sixth Amendments of the U. S. Constitution, 26 USC 5117, and 26 USC 7342 are set forth in Appendix "C", infra.

STATEMENT OF THE CASE

Petitioner Anthony S. Carollo, a restaurant proprietor, was convicted of violating 26 USC 5117(a) by purchasing distilled spirits for resale from one who was neither exempt nor a wholesale dealer in liquor who had paid the special dealer's tax. The sole issue presented on appeal to the Court of Appeals was whether certain statements made by Carollo during an administrative inspection of his restaurant should have been excluded from evidence, inasmuch as they were elicited from him in the course of an interrogation commenced after evidence of a 5117 violation was discovered on his premises, but without administration of any Miranda-type warnings.

The facts concerning the statements are as follows: On June 8, 1972, Special

Agent Klotz and other agents of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF), pursuant to warrant, conducted an administrative inspection of the Venezia Restaurant. Upon entering the restaurant, Klotz identified himself and his fellow agents and explained the purpose of his visit, "in that we would check the open liquor bottles, could check his liquor stock, to check his records and his... federal tax stamp." (R.pp.54-55) Carollo, in turn, introduced himself as the owner and proprietor of the restaurant and offered to help the ATF agents in any way that he could while they conducted their inspection. (R.p.55) While the agents executed the inspection Carollo continued to conduct his business, moving about and greeting

customers, etc. (R.p.60) In the course of the inspection, Klotz noticed that a number of whiskey bottles behind the bar had price markings on them which resembled those used by retail distributors, such as supermarkets. (R.p.56) His suspicions aroused, in the light of his knowledge that Venezia Restaurant was not a package liquor store, and that it is not a normal practice for establishments such as Venezia to place such marks on its bottles, and that wholesalers do not mark bottles in this manner (R.p.56), Klotz asked Carollo where he purchased his liquor. (R.p.63) Carollo named approximately six wholesalers and Klotz then asked him "if that was all." Carollo then said, "No," and added, "When I run short I...go to my friend over at John's

liquor store." Klotz pressed the question, "Well, what John's liquor store?" Carollo replied, "Well, the liquor store on Broad Street across from Bohn Ford." (R.p.64) Carollo acknowledged that he had been doing this for some time and that the last purchase had been about three weeks prior. (R.p.65) At this point Klotz picked up two bottles of whiskey with prices marked on them, placed them on the table in front of Carollo and asked, "Are these the bottles you purchased from John?" to which Carollo responded, "Yes." Klotz then asked, "What about the rest of the bottles that had price marks?" Carollo again answered, "Yes." (R. pp.65-66) Klotz then seized the bottles. (R.p.57) Subsequent investigation revealed that "John's liquor store" located "on Broad

Street across from Bohn Ford" was in reality "L&J Liquor Store" at the described location. Its operators, John and LeBonio Paternostro, were the holders of only a federal retail special tax stamp. (R.pp.66-67) At no time during the inspection of the restaurant, nor during the interrogation by Klotz, was Carollo advised of his "Miranda rights" (R.pp.59,63)

Approximately a year after this inspection and seizure, criminal prosecution was commenced in the Eastern District of Louisiana against petitioner for violation of 26 USC 5117 by filing an Information to that effect. (R.pp.1-2) Trial on the merits was held before the U. S. Magistrate on November 29, 1973; at this trial, Special Agent Klotz testified, over petitioner's objection (R.

p.58), to the statements petitioner had made in response to Klotz' interrogation described supra. The trial court overruled petitioner's objection (R.p. 64); subsequently, the court adjudged petitioner guilty as to the one count charged in the Information. (R.p.28) Petitioner appealed this conviction first to a judge of the District Court (R.pp.45-46), who affirmed the Magistrate's judgment on February 6, 1974. Petitioner then appealed this judgment to the U. S. Court of Appeals for the Fifth Circuit (R.p.94), where said judgment was affirmed on January 23, 1975, (Appendix "A") and the petition for rehearing was denied on March 13, 1975. (Appendix "B")

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the decision in this case conflicts with that of the Court of Appeals for the Seventh Circuit in US v. Dickerson (7 Cir 1969) 413 F2d 1111, in that the decision of the Court of Appeals for the Fifth Circuit in this case held that an individual interrogated by Special Agents of the A.T.F. Bureau of the Treasury Department concerning an apparent irregularity discovered in the course of an administrative inspection (an irregularity which, if not satisfactorily explained, would evidence a violation of 26 USC 5117, a penal revenue law) is not entitled to receive from said agents any "Miranda-type" warning of his constitutional rights under the Fifth Amendment's Self-

Incrimination Clause and the Sixth Amendment's Assistance of Counsel Clause prior to such questioning, while the Seventh Circuit Court of Appeals in Dickerson held that:

> Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings...
>
> Under such circumstances it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents...

413 F2d 1111, 1116.

Furthermore, the Fifth Circuit Court in this case, and the Seventh Circuit Court in Dickerson, have, in their conflicting decisions, each decided an important question of federal law which

has not been, but should be, settled by this Honorable Court, to-wit: whether "custodial interrogation" alone required the Miranda-warning procedure, or whether one confronted with governmental authority in an adversary, situation (of which "custodial interrogation" is merely one variety) should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances.

For these reasons, this Honorable Court should grant review herein.

I.

SHOULD ONE CONFRONTED WITH GOVERNMENTAL AUTHORITY IN AN ADVERSARY SITUATION BE ACCORDED THE OPPORTUNITY TO MAKE AN INTELLIGENT DECISION AS TO THE ASSERTION OR RELINQUISHMENT OF THOSE CONSTITUTIONAL RIGHTS---i.e., FIFTH AMENDMENT FREEDOM FROM INVOLUNTARY

SELF-INCRIMINATION AND SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL---DESIGNED TO PROTECT HIM UNDER PRECISELY SUCH CIRCUMSTANCES?

In Dickerson, the Seventh Circuit Court of Appeals, while recognizing "the factual limitations of the precise holding in Miranda," nevertheless refused to "accept an interpretation of that decision which would restrict the implementation of the (Supreme) Court's overriding concern with the opportunity for intelligent exercise of constitutional rights to interrogations conducted in police stations." 413 F2d 1111, 1114.

The factual matrix of the Dickerson decision involved the following:
IRS Revenue Agent Petrovic in the course of auditing certain company records found an entry on the books reflecting a large payment to Dickerson, while the company

had filed no related information return. Consequently, in July 1964 Petrovic audited Dickerson, who admitted that he had failed to file certain income tax returns. Late in 1964 Petrovic referred the case to his superiors to determine if the case warranted criminal investigation. In January 1965 the case was assigned to Special Agent Cornue, an investigator for the Intelligence Division of the Internal Revenue Service (the jurisdiction of the Intelligence Division being limited to criminal investigations), Petrovic being assigned to assist Cornue. Petrovic and Cornue began their joint investigation on March 24, 1965, with a visit to Dickerson at his place of business. On this occasion, Cornue identified himself as a Special Agent but

did not advise Dickerson that the investigation had become criminal, nor was Dickerson advised of any of his constitutional rights. The duo again saw Dickerson on May 7, while Cornue alone interviewed him on March 29, April 1, April 6, and June 24. The duo again interviewed Dickerson, this time in the presence of Dickerson's attorney, on November 10. However, it was conceded that Dickerson's indictment for failure to file income tax returns in violation of 26 USC 7203 resulted from information gathered at five of the earlier interviews, when Dickerson answered the agents' questions and furnished them with documentary and oral information. Dickerson moved to suppress the evidence thus obtained, on the basis of the agents' admitted failure to

warn him of his constitutional rights during these five interviews. The district court for the Northern District of Illinois held that "at and from the time a criminal investigation is launched against a taxpayer," IRS agents are required to inform him of his right to remain silent, that anything he says may be used against him, and that he has a right to counsel. Applying the Miranda rationale, the district court held that the evidence obtained from Dickerson during the criminal investigation and before his retention of counsel would have to be suppressed, along with any evidence obtained as a result of information gained during that phase of the criminal investigation. US v. Dickerson (ND Ill 1968) 291 FSupp 633. The Government appealed pursuant to 18 USC

3731, and the Court of Appeals for the Seventh Circuit affirmed the decision of the district court.

Observing that "Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in Miranda," and that "ignorant compliance with the request of the authorities can no longer be equated with a valid waiver of constitutional rights," the Court of Appeals in Dickerson said:

> We understand the teaching of Miranda to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights,

> or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, "The Constitutional Rights of the Taxpayer in a Fraud Investigation," 44 Taxes 660, 668 (1966).
>
> In this Circuit, the district courts recently considering the question have uniformly held that some form of warnings must be given by IRS agents once an investigation has shifted to one criminal in nature, despite the absence of physical custody...

413 F2d 1111, 1114.

Recognizing the existence of a line of cases, notably Kohatsu v. US (9 Cir 1965) 351 F2d 898, which "reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently 'focused' on the suspect

as to require that warnings be given," the Seventh Circuit in Dickerson adopted the answer made to such arguments by Judge Will of the Northern District of Illinois in US v. Turzynski (ND Ill 1967) 268 FSupp 847, 852-853:

> This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, i.e., when the investigative machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit be known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction.

The Dickerson court elaborated:

...Nor can the Kohatsu rationale,

> once accepted, be limited to investigations in the tax area. Such a rationale would apply to most white-collar crimes and any other crimes where the identity of the suspected lawbreaker is not in issue. This category might include unauthorized practice of law, attempted bribery, impersonation of a federal officer, refusal to report for induction, violation of Section 5 of the Securities Act, the Landrum-Griffin Act, and the Sherman Act, among others. No principal distinction has been suggested which would carve out such exceptions to the policies expressed in Miranda.

413 F2d 1111, 1115.

Briefly noting that this Court in Mathis v. US (1968) 391 US 1 rejected the Government's argument that questions asked of a taxpayer incarcerated for an unrelated offense as part of a routine tax investigation fall outside the scope of Miranda, 413 F2d 1111, 1115, the Dickerson court thus answered the Government's argument "that the absence of custodial detention and other indicia of

criminal prosecution in the tax fraud investigation negatives any possibility of coercion or overbearing of the taxpayer's will":

> ...But it is the very fact that the taxpayer is not informed of the pendency of a criminal investiation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nvertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe. As the district judge observed (291 FSupp at pp. 636-637):
>
> > "...In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities."
>
> ...As noted in Lipton, "Constitutional Rights in Criminal Tax Investigations," 45 FRD 323, 336 (1968), the pressures on the uninformed taxpayer to cooperate with the agents are considerable:
>
> "First, there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a

taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. The average citizen, moreover, believes that the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes. Who would believe the ironic truth that the cooperative taxpayer fares much worse than the individual who relies upon his constitutional rights!"

413 F2d 1111, 1116.

The Dickerson court then concluded:

Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings. Cf: Gouled v. US, 255 US 298, 305-306...; US v. Guerrina, 112 F. Supp. 126 (E.D.Pa.1953), modified, 126 FSupp 609 (E.D.Pa.1955); Comment, "Constitutional Rights of the Taxpayer in a Tax Fraud Investigation," 42 Tul.L.Rev. 862-865 (1968).

Under such circumstances it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that

he need not answer questions put to him by the agents. "For those unaware of the privilege, the warning is needed simply to make them aware of it---the threshold requirement for an intelligent decision as to its exercise." Miranda v. Arizona, 384 US 436, 468...The rationale behind the warning as to the consequences of waiving the right to remain silent, as expressed in Miranda, is particularly apt to the present situation, for "this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system---that he is not in the presence of persons acting solely in his interest." 384 US at p.469...As in Miranda, we deem advice as to the right to have counsel present a valuable adjunct to the protections of the Fifth Amendment prescribed above.

Our conclusion is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division. We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings

> without regard to the individual taxpayer's subjective state of mind...

413 F2d 1111, 1116-1117.

Compare the foregoing with the Fifth Circuit's appreciation and application of Miranda in the instant case:

> The Fifth Amendment does not preclude the prosecution from making use of a defendant's self-incriminating statements; rather, it forbids the state to compel a criminal defendant to be a witness against himself. In Miranda v. Arizona, supra, the Supreme Court determined that a custodial investigation is so fraught with coercive possibilities that statements made under such conditions (absent an attorney) should be considered compelled unless the defendant had been read and waived his now famous Miranda rights. But, absent custodial investigation or interrogation, the Miranda warnings are not necessarily required. This is so since, except possibly in some rare case which we need not attempt to hypothesize here, absent custody the element of coercion disappears. Thus, the controlling question in this case becomes whether or not Carollo was in custody at the time he made his incriminating admission that he

> purchased distilled spirits from "John's". We conclude that he was not; that Miranda warnings were not, therefore, required; and that his conviction should be affirmed.

Appendix "A", infra, pp.IV-V.

That the Fifth Circuit's appreciation and application of the Miranda doctrine is in irreconcilable conflict with that of the Seventh Circuit is further demonstrated by the Fifth Circuit decisions in US v. Dawson (5 Cir 1973) and US v. Prudden (5 Cir 1970) 424 F2d 1021, in which cases the Fifth Circuit specifically repudiated the rationale of the Seventh Circuit in Dickerson. In order to resolve this conflict between Circuits as well as to define the constitutional rights quoad self-incrimination and assistance of counsel adherent to individuals who find themselves henceforth in the dilemma faced

by petitioner herein, this Honorable Court should review the decision below.

II.

IS AN INDIVIDUAL RESTAURANT OPERATOR, IN WHOSE RESTAURANT AN ADMINISTRATIVE A.T.F. INSPECTION IS BEING CONDUCTED---IN THE COURSE OF WHICH INSPECTION THE A.T.F. AGENTS DISCOVER LIQUOR BOTTLES BEARING RETAIL-TYPE PRICE-MARKINGS (INDICATING THAT THEY MAY HAVE BEEN ACQUIRED FROM A RETAILER SUCH AS A SUPERMARKET OR PACKAGE LIQUOR STORE AND NOT FROM A WHOLESALER, IN VIOLATION OF 26 USC 5117)---ENTITLED TO BE INFORMED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS VIA A MIRANDA-TYPE WARNING PRIOR TO BEING QUESTIONED BY SAID AGENTS CONCERNING THE SOURCE OF HIS LIQUOR STOCK IN GENERAL AND OF THE PRICE-MARKED BOTTLES IN PARTICULAR?

The court below, in its opinion of January 23, 1975, analyzed the factual situation as follows:

> An examination of the facts shows that of the four factors mentioned above only the focus of investigation factor is even arguable present in the case under consideration. There was no probable cause to arrest Carollo before he made his damaging admissions. The price markings on the bottles were ambiguous in

> nature; the bottles could have come from any number of sources, including a wholesaler. As to subjective intent of the police, Agent Klotz testified that he believed that Carollo was entirely free to leave at any time during the inspection and that he would not have prevented him from leaving. Carollo was never told that he could not leave; in fact, he walked away several times during his conversations with the ATF agents to conduct restaurant business. Carollo's subjective belief about his freedom of action was indicated by his willingness to help the agents while conducting business as usual. Carollo insists, however, that when Agent Klotz began questioning him about where he got his liquor he became the focus of a criminal investigation.
>
> We shall assume without deciding that Agent Klotz's questions were more than mere administrative inquiries and that they constituted a criminal investigation which had focused upon Carollo. Even accepting Carollo's characterization of Agent Klotz's question, we are unpersuaded that, under the facts of this case, the focus-of-investigation factor alone was enough to create a custody situation...

Appendix "A", infra, pp.V-VI.

(It would be well to note at this

point that the Court of Appeals' statement---"The price markings on the bottles were ambiguous in nature; the bottles could have come from any number of sources, including a wholesaler." -- is not only unsupported by the evidence in the case, but is also flatly contradicted by the testimony of Agent Klotz on this point:

Q. What did you notice if anything about the bottles?
A. ...I noticed on many of the bottles that were behind this bar had price marks on them, either by pencil, marking pen or by a stamp which is...price marking stamp, which is used mostly by the supermarkets and so forth to put markings on their products.
Q. Was Venezia Restaurant a package liquor store?
A. No sir it was not.
Q. Was this a common practice in most bars to price mark bottles like this?
A. That type of establishment, it is not a normal practice.
Q. To your knowledge do wholesalers mark bottles like this?
A. They do not.

R.p.56. The foregoing excerpt of testimony constitutes the entirely of the evidence bearing on the significance of the price-marks.)

Lest it be argued that the Seventh Circuit's Dickerson case and the instant case are so factually dissimilar as to be distinguishable and therefore reconcilable, let us examine at this point the basic similarity of the two cases.

Fortunately for the Dickerson court, the internal organization of the Internal Revenue Service provides a clearly visible signpost whereby a court may identify that point in time at which a routine or "civil" audit shifts and changes its character to a "criminal investigation": the point at which Special Agents of the Intelligence Division, a division whose personnel are concerned only with

tax investigations of a criminal nature, enter the investigation. "As soon as an Internal Revenue Agent has reason to believe that the taxpayer under investigation has committed a criminal violation, he must refer the case for criminal investigation. If his superiors in the civil department agree with his conclusions, the case is referred to the Intelligence Division..." US v. Turzynski (N.D.Ill.1967) 268 FSupp 847, 849.

The Alcohol , Tobacco and Firearms (ATF) Bureau of the Treasury, however, apparently does not have such a nicely divided organization with distinct spheres of activity. Special Agents such as Klotz conduct "routine" administrative inspections such as the one involved here, and, when indicia of

criminal violation are discovered, such as the price-marked bottles in this case, themselves immediately, then and there "follow up" with an investigation concerned specifically with the apparent violation and seek to elicit from the proprietor responses which are not merely informative but which must needs be either inculpatory or exculpatory. (It should be remembered that every interrogated suspect can make either exculpatory or inculpatory responses to interrogation; it is the inculpatory response which the prosecution normally seeks to introduce in evidence, while the exculpatory responses are forgotten, except when employed to impeach defense testimony in variance therewith.) The mere fact that from the ATF's organizational viewpoint the initial administra-

tive inspection, the questioning of Carollo about the price-marked bottles discovered in the course of the inspection, and the seizure of the price-marked bottles all constitute a single episode should not deter the courts from recognizing the point---when Klotz noticed the price-marks on the bottles and, in the context of the significance of these price-marks to Klotz as per his testimony (R.p.56), Klotz began to question Corollo about his purchasing practices (questioning, not inspection of records, invoices, etc.)---at which the character of the proceeding shifted, changed, or altered, and became a criminal investigation concerning an apparent violation of 26 USC 5117, with Carollo, the proprietor of the establishment, as the "focus" of the investigation.

The considerable pressures on uniformed taxpayers to cooperate with IRS abents discussed in Dickerson at 413 F2d 1116 are paralleled in the instant case by the penal statutory provisions of 26 USC 7342:

> Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

The coercive pressure of this statute accounts for Carollo's verbal gesture of cooperation---"OK and any way I can help you to call upon me."---made at the commencement of the routine administrative inspection, as well as for Carollo's continued cooperation in responding to

Klotz's interrogation about Carollo's purchasing practices after the nature of the proceeding had changed, without notice to Carollo, from a routine administrative inspection (comparable to the routine, "civil" audit by an IRS "Revenue Agent") of his restaurant to a criminal investigation of an apparent violation of 26 USC 5117 (comparable to a criminal investigation by Special Agents of the IRS Intelligence Division).

From the foregoing, it should be apparent that the fact situations of Dickerson and the instant case are substantially identical underneath the superficial dissimilarities, and that the Seventh Circuit's decision in Dickerson and that of the Fifth Circuit in the instant case are mutually irreconcilable, and, in order to settle

this important question of constitutional magnitude, this Honorable Court should review the decision of the Court of Appeals for the Fifth Circuit in the instant case.

III.

The questions presented by this case are of great and recurring significance in the administration of criminal justice in the federal courts, as well as in the courts of the various states, due to the constitutional basis of the controversy. The conflict between the decisions of the Seventh Circuit Court of Appeals and of the Fifth Circuit Court of Appeals in the instant case make this case peculiary appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WHEREFORE, your petitioner, Anthony S. Carollo, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court of Appeals had in this cause, to the end that the cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that the petitioner may be granted such other and further

relief as to this Court may seem proper.

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CERTIFICATE OF SERVICE

I, the undersigned Michael F. Barry, Esq., attorney for Anthony S. Carollo, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____day of April, 1975, I served copies of the foregoing Petition for Writ of Certiorari, including

Appendices "A", "B" and "C" thereof, on the United States of America, respondent herein, by leaving three (3) copies thereof at the office of Hon. Philip Krajewski, Special Attorney, Department of Justice, at 526 St. Louis Street, New Orleans, La., 70130, and by mailing three (3) copies in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington,D.C. 20530, pursuant to Rule 33.2(a) of the Rules of the Supreme Court of the United States.

MICHAEL F. BARRY
Attorney for Petitioner
Anthony S. Carollo
905 Maison Blanche Bldg.
New Orleans, La. 70112

APPENDIX "A"

2924

UNITED STATES of America, Plaintiff-Appellee,

v.

Anthony S. CAROLLO, Defendant-Appellant.

No. 74–1420.

United States Court of Appeals,
Fifth Circuit.

Jan. 23, 1975.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., of purchasing distilled spirits for resale from an unauthorized source, and he appealed. The Court of Appeals affirmed without published opinion, 500 F.2d 1183. On rehearing, the Court of Appeals held that defendant, a restaurant owner, was not in custody of special treasury agents whom he was accompanying on an administrative inspection of his restaurant at time he made incriminating admission as to purchase of distilled spirits from unauthorized source, and thus failure of special treasury agents to give defendant Miranda warnings did not require exclusion of such statements.

Affirmed.

1. Criminal Law ⇐412.2(2)

Defendant, a restaurant owner, was not in custody of special treasury agents whom he was accompanying on an administrative inspection of his restaurant at time he made incriminating admission as to purchase of distilled spirits from unauthorized source, and thus failure of special treasury agents to give defendant Miranda warnings did not require exclusion of such statements. 26 U.S.C.A. (I.R.C.1954) §§ 5117, 5117(a); U.S.C.A.Const. Amend. 5.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classifications constitute no part of the opinion of the court.

INDEXED

2. Criminal Law ⇐412.2(2)

The term "custodial interrogation," for purposes of Miranda rule, is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐412.2(2)

The concept of "custody" for purposes of application of Miranda rule must be determined on a case-by-case basis. U.S.C.A.Const. Amend. 5.

4. Criminal Law ⇐412.2(2)

Four factors should be considered by courts in making determination whether a suspect is "in custody" for purposes of Miranda rule: (1) probable cause to arrest, (2) subjective intent of police, (3) subjective belief of defendant, and (4) focus of the investigation. U.S.C.A.Const. Amend. 5.

5. Criminal Law ⇐412.2(2)

Even if special treasury agent's questioning of suspect were more than mere administrative inquiries and constituted a criminal investigation which had focused on suspect, that factor, by itself, was not enough to create a custody situation requiring agent to give suspect Miranda warnings. U.S.C.A. Const. Amend. 5.

6. Criminal Law ⇐412.2(2)

The fact that a suspect has become the focus of a criminal investigation, standing alone, does not place suspect in "custody" for purposes of Miranda rule. U.S.C.A.Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Eastern District of Louisiana.

On Petition for Rehearing

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

In response to the petition for rehearing, the prior unpublished opinion of the Court is withdrawn and the following is substituted.

Defendant-appellant Carollo, a restaurant proprietor, was convicted of having violated 26 U.S.C. § 5117(a) by purchasing distilled spirits for resale from one who was neither exempt nor a wholesale dealer in liquor who had paid the special dealer's tax.[1] Following his conviction Carollo was placed on six-months inactive probation and fined $50. The sole issue before this court on appeal is whether certain statements made by Carollo during an administrative inspection of his restaurant should have been excluded from evidence. Carollo argues that they should have been, alleging that these statements, which were incriminating, were elicited from him after he was in custody but before he was given any *Miranda*[2] warnings.

[1] On June 8, 1972, Special Agent Klotz and other agents of the Treasury's Bureau of Alcohol, Tobacco and Firearms (ATF), pursuant to warrant, conducted an administrative inspection of the Venezia Restaurant. Upon entering the restaurant, Klotz identified himself and his fellow agents and explained the purpose of his visit. Carollo, in turn, introduced himself as the owner and proprietor of the restaurant and offered to help the ATF agents in any way that he could while they conducted their inspection. He then moved freely

1. § 5117. Prohibited purchases by dealers

(a) General.—It shall be unlawful for any dealer to purchase distilled spirits for resale from any person other than—

(1) a wholesale dealer in liquors who has paid the special tax as such dealer to cover the place where such purchase is made; or

(2) a wholesale dealer in liquors who is exempt, at the place where such purchase is made, from payment of such tax under any provision of this chapter; or

(3) a person who is not required to pay special tax as a wholesale dealer in liquors.

2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

about his restaurant and on several occasions left the agents and waited on customers who had entered. While inspecting, Klotz noticed that a number of whiskey bottles behind the bar had price markings on them which resembled those used by retail distributors. His suspicions aroused, he asked Carollo where he purchased his spirits. Carollo at first named six wholesalers but then admitted that when he ran short he sometimes purchased liquor from "my friend over at John's Liquor Store." Upon further questioning, he gave the agents the location of the store and acknowledged that he had been purchasing liquor there for some time. At this point Klotz picked up two bottles of whiskey with prices marked on them and asked Carollo whether they had been purchased from "John's." Upon receiving an affirmative answer, he seized the bottles. Subsequent investigation revealed that "John's" was in reality "L & J Liquor Store." Its operators were the holders of only a federal retail special tax stamp. At no time during the inspection of his restaurant was Carollo read his *Miranda* rights.

The Fifth Amendment does not preclude the prosecution from making use of a defendant's self-incriminating statements; rather, it forbids the state to compel a criminal defendant to be a witness against himself. In Miranda v. Arizona, *supra*, the Supreme Court determined that a custodial investigation is so fraught with coercive possibilities that statements made under such conditions (absent an attorney) should be considered compelled unless the defendant had been read and waived his now famous *Miranda* rights. But, absent custodial investigation or interrogation, the *Miranda* warnings are not necessarily required. This is so since, except possibly in some extremely rare case which we need not attempt to hypothesize here, absent custody the element of coercion disappears. Thus, the controlling question in this case becomes whether or not Carollo was in custody at the time he made his incriminating admission that he purchased distilled spirits from "John's." We conclude that he was not; that

Miranda warnings were not, therefore, required; and that his conviction should be affirmed.

[2–4] This court has attempted to define the meaning of "in custody" or "custodial investigation," but its attempts have produced limited success. We know that *Miranda* teaches that "custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Miranda, supra*, at 444, 86 S.Ct. at 1612. But this knowledge has not proved overly helpful for it leaves open the definition of the most important concept–custody. Lacking a general rule by means of which we can mechanically distinguish "custodial" from "non-custodial" interrogation, we have chosen to determine this issue on a case-by-case basis. Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972); United States v. Phelps, 443 F.2d 246 (5th Cir. 1971). Nevertheless, we have, as Carollo points out, identified four significant factors which should be considered in making the determination. These are, (1) probable cause to arrest, (2) subjective intent of the police, (3) subjective belief of the defendant, and (4) focus of the investigation. *Brown, supra*, 468 F.2d at 1286; *Phelps, supra*, 443 F.2d at 247.

An examination of the facts shows that of the four factors mentioned above only the focus of investigation factor is even arguably present in the case under consideration. There was no probable cause to arrest Carollo before he made his damaging admissions. The price markings on the bottles were ambiguous in nature; the bottles could have come from any number of sources, including a wholesaler. As to subjective intent of the police, Agent Klotz testified that he believed that Carollo was entirely free to leave at any time during the inspection and that he would not have prevented him from leaving. Carollo was never told that he could not leave; in fact, he walked away several times during his conversations with the ATF agents to conduct restaurant business. Carollo's subjective belief about his freedom of action was indicated

by his willingness to help the agents while conducting business as usual. Carollo insists, however, that when Agent Klotz began questioning him about where he got his liquor he became the focus of a criminal investigation.

[5] We shall assume without deciding that Agent Klotz's questions were more than mere administrative inquiries and that they constituted a criminal investigation which had focused upon Carollo. Even accepting Carollo's characterization of Agent Klotz's questions, we are unpersuaded that, under the facts of this case, the focus-of-investigation factor alone was enough to create a custody situation. We decide this realizing full well that several of our past decisions have emphasized the importance of this particular factor. *Phelps, supra*; Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969), cert. denied, 400 U.S. 967, 91 S.Ct. 379, 27 L.Ed.2d 387 (1970); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).

[6] In spite of the broad language of these cases, it is clear that in each the police had probable cause to arrest before they focused their investigation on the defendant. In *Phelps* the ATF agents knew that there had been a violation of the law as soon as they observed the cutdown rifle in the showcase. Similarly, in *Bendelow* the highway patrolman had probable cause to make an arrest as soon as he noticed the altered license. *Bendelow, supra*, 418 F.2d at 47, fn. 6. Likewise, in *Windsor*, "Sharp had already given the agents sufficient evidence for them to conclude that Windsor was also involved in the interstate transportation of the stolen car. There was therefore probable cause to arrest him." *Windsor, supra*, 389 F.2d at 534. In short, we have found no case in which it has been held that a defendant is "in custody" when the focus factor alone is present. Nor do we feel that such a *per se* holding would be wise. By way of example, we fail to see how it could possibly be said that a person at the opposite end of a telephone wire is "in custody" just because the policeman talking to him has focused an investigation on him.

We choose to remain true to the basic teachings of *Brown* and *Phelps* that decisions on custody must be made on a case-by-case basis.

Since we are convinced that Carollo was not in custody at the time he was questioned by Klotz, his conviction is affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk

March 13, 1975

TO ALL COUNSEL OF RECORD

Re: 74-1420 U.S.A. V. CAROLLO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By s/Anne G. Parent
Deputy Clerk

cc: Mr. Michael F. Barry
Messrs. Stephen A. Mayo
J. Phillip Krajewski

APPENDIX "C"

FIFTH AMENDMENT, UNITED STATES CONSTITUTION (pertinent parts):

> No person...shall be compelled in any criminal case to be a witness against himself...

SIXTH AMENDMENT, UNITED STATES CONSTITUTION (pertinent parts):

> In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defence.

26 USC 5117. Prohibited purchases by dealers

> (a) General. It shall be unlawful for any dealer to purchase distilled spirits for resale from any person other than---
>
> (1) a wholesale dealer in liquors who has paid the special tax as such dealer to cover the place where such purchase is made; or
>
> (2) a wholesale dealer in liquors who is exempt, at the place where such purchase is made, from payment of such tax under any provision of this chapter; or (3) a person who is not required to pay special tax as a wholesale dealer in liquors.

(b) Penalty and forfeiture. For penalty and forfeiture provisions applicable to violation of subsection (a). see sections 5687 and 7302.

26 USC 7342. Penalty for refusal to permit entry or examination

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.